

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14

WELLINGTON ENVIRONMENTAL CONSULTING
AND CONSTRUCTION SERVICES, INC.¹

Employer

and

Case 14-RC-12509

LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA, THE EASTERN MISSOURI
LABORERS' DISTRICT COUNCIL²

Petitioner

REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION

The Employer, Wellington Environmental Consulting and Construction Services, Inc., provides environmental consulting and remediation services for residential and commercial clients. The Petitioner, Laborers' International Union of North America, The Eastern Missouri Laborers' District Council, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act, seeking to represent the Employer's laborers, field supervisors, and warehousemen. A hearing officer of the Board held a hearing and the parties filed briefs.

As evidenced at the hearing and in the briefs, the parties disagree on three issues: (1) whether the field supervisors are statutory supervisors; (2) whether six of the field supervisors are managers; and (3) whether the unit can appropriately include the warehousemen. Contrary to the Petitioner, the Employer contends that the field supervisors are supervisors and that six

¹ Employer's name appears as amended at hearing.

² Petitioner's name appears as amended at hearing.

of the field supervisors are also managers. The Employer further contends that the warehousemen do not share a community of interest with the laborers and therefore must be excluded from the unit.

I have considered the evidence and the arguments presented on these issues. As discussed below, I have concluded that the field supervisors are supervisors and therefore properly excluded from the unit. I have also concluded that none of the field supervisors are managers. Finally, I have concluded that the warehousemen share a community of interest with the laborers and are appropriately included in the unit as requested by the Petitioner.

I. OVERVIEW OF OPERATIONS

The Employer is primarily engaged in the removal of hazardous materials, such as asbestos, lead, wastewater, and mold from customer job sites, including universities, manufacturing plants, schools, hospitals, and private homes. The Employer also provides environmentally-related consulting services, such as manual writing and indoor air quality studies. The Employer operates a single facility in St. Louis, Missouri, which consists of office space and a warehouse/shop and employs approximately 50 employees.

The Employer's president and chief executive officer ("CEO") and chief financial officer ("CFO") are responsible for the Employer's overall operations. Directly reporting to the CEO are the vice president of estimating, director of field operations, vice president of engineering, and marketing assistant.³ The CEO and the vice president of estimating are primarily responsible for obtaining new projects for the Employer and they sign and submit bid sheets to prospective clients. The director of field operations oversees the field operations and supervises the field supervisors, laborers, and warehousemen. The Employer employs 15 field supervisors (two of whom are in training), 15 laborers, and two warehousemen.

³ The parties stipulated that the CEO, CFO, and director of field operations are supervisors under the Act; that the vice president of estimating and the vice president of engineering are managers under the Act; and that the marketing assistant is a confidential employee under the Act.

On a weekly basis, the Employer may have from 10 to 40 jobs ongoing at various locations within a 100-mile radius of the St. Louis area. These jobs vary in complexity, size, and duration; some requiring only one employee, others requiring as many as 20 to 30 employees, some lasting a couple hours, others lasting days or more. Many of the jobs require evening and weekend work and therefore the work hours of the field supervisors and laborers fluctuate considerably. The director of field operations assigns a field supervisor to be in charge of each job site. If more than one field supervisor is on a job site, the ones not designated in charge perform the same work as the laborers. If a job requires only one employee, a field supervisor is sent. The director of field operations spends only 10-15 percent of his time on job sites, but communicates with the field supervisors on at least a daily basis via Nextel phones.

The regulations governing the majority of the Employer's clean-up projects require the presence on the worksite of a supervisory employee who possesses a license that all field supervisors have, but most laborers do not. Field supervisors and laborers receive a 40-hour training class on safety and regulatory issues. In addition, field supervisors earn their licenses by completing an additional 8-hour training class. The Employer also requires that field supervisors have at least 1 year of work experience.

The hourly wage rate for field supervisors ranges from \$11.50 to \$18.75; the hourly wage rate for laborers ranges from \$10 to \$12; and the hourly wage rates for the two warehousemen are \$13.50 and \$18.50. Field supervisors receive paid vacation and safety days; laborers do not receive any benefits. Laborers on average have worked for the Employer for less than 5 years, while field supervisors and warehousemen have worked for the Employer an average of 8-10 years. The parties stipulated that all the field supervisors have the same duties, responsibilities, authority, and benefits.

II. DUTIES OF FIELD SUPERVISORS

A. Assignment of Work/Transfers

The estimator and the director of field operations and sometimes the field supervisor determine the number and identity of the employees assigned to each project. On certain projects, the field supervisors can request that specific laborers be assigned to their projects, which requests are denied by the director of field operations only about 20-25 per cent of the time, usually because the requested employees are not available or do not have the proper license for the job. Once the job commences, the field supervisor is responsible for the assignment of all tasks to be performed. Although the field supervisors are given job folders setting forth, inter alia, the scope of the work to be performed on the project, the folders contain no guidelines for assignment of specific tasks. The two field supervisors who testified admitted that while they accept input from the laborers on task assignments, they assign work based upon their assessment of the employees' skills, abilities, experience, and training. For example, one supervisor testified that he does not assign an employee with whom he is not familiar work such as decontaminating "bio" or chemical fume hoods, because that work is more dangerous; rather, the supervisor would initially assign the employee work such as decontaminating shelving, cabinets, or countertops. The supervisors also prioritize work on the job, in that they will, if necessary, tell laborers the order in which tasks should be performed, although the more experienced laborers generally know what to do. The field supervisors usually spend about 80 percent of their time performing the hands-on work, although the percentage may vary depending on the size of the job.

The jobs usually, but not always, have daily start and end times, which are set forth in the job folder given all field supervisors. The field supervisors have the authority, with the customer's approval, to change these times, i.e. start the job earlier in the day, so employees get off earlier. The field supervisors do inform the director of field operations of any time changes, and during the busy season, the director of field operations will limit how early

employees may start on day jobs so as to minimize paying employees overtime for downtime between day and evening jobs. If work is completed early on a job, the field supervisor has the authority to send employees home. The CEO and director of field operations testified that field supervisors have the authority to assign a few hours of overtime work if necessary to complete a job in a timely manner and to determine which employees work overtime. The record does not reflect whether or not the field supervisor can require an employee to work overtime. The field supervisors do notify the director of field operations that overtime is required and the field supervisors testified that they normally seek approval from the project's estimator before they authorize overtime to limit potential cost overruns, unless they know the estimator has included possible overtime work in the job bid.

After the commencement of a job, the field supervisor determines the staffing levels. If a job is winding down, the field supervisor notifies the director of field operations that he no longer needs all of the employees and determines which employees will be removed from the job. The director of field operations will then determine if the employee is sent to another job or laid off. If the field supervisor needs more personnel, he contacts the director of field operations and requests assistance. The director of field operations attempts to accommodate these requests if staff is available. Normally, if a field supervisor needs to replace a laborer on his job site with someone else, the field supervisor contacts the director of field operations, who determines whether to transfer a laborer from a different job site. Field supervisors occasionally transfer laborers to different work projects without first consulting with the director of field operations; however, this typically occurs when the director of field operations is unavailable, which is at night and on weekends. A field supervisor testified that around the time of the hearing, he contacted another field supervisor to arrange for the transfer of the field supervisor and a laborer to his worksite without first receiving permission from the director of field operations. The field supervisor further testified that he subsequently contacted the field supervisor to cancel the project in light of the hearing, but did notify the director of field operations. The

director of field operations testified he always approves field supervisors' requests to transfer laborers so long as the laborers are available, and recalled an instance in which he approved a field supervisor's request to transfer a laborer with a construction background to work on a waterproof-board installation job. Though he usually follows the field supervisors' recommendations on whom to transfer, the director of field operations conceded that he has overruled field supervisors' requests to transfer laborers to different sites.

On weekends, field supervisors are assigned rotating on-call duty for emergency projects. The director of field operations testified that field supervisors have the independent authority to call in additional laborers needed to assist on an emergency project. One field supervisor testified that he normally contacts the director of field operations, who keeps an employee list, to assign additional laborers for weekend jobs, although the director of field operations is not always available on the weekends. Field supervisors cannot require laborers to come in to work.

B. Responsible Direction

The field supervisor is issued a job book, which contains documentation to facilitate the completion of a project such as the daily log, the pre-inspection checklist, the equipment checklist, the work area final inspection checklist, the incident report, the employee discipline record, the air monitoring data sheet, the supervisor checklist, the sign-in/sign-out log, and the extra work authorization form. The parties stipulated that field supervisors spend about 15 to 30 minutes each day filling out all of the forms in the job book. The field supervisors are responsible for ensuring compliance with the various regulations that govern the Employer's projects, and for making sure the project stays on schedule. One field supervisor testified, however, that he would not be held responsible if one of his projects does not finish on time, rather it is the estimator's job to allocate sufficient time for the project. Field supervisors schedule lunch and breaks on a job site, but do not approve vacations or other leave. The Employer does not maintain a policy concerning the scheduling of meals or breaks and field

supervisors are free to schedule meals and breaks or skip them depending on the needs of the project.

The job book also typically contains a scope of work worksheet, prepared by the job's estimator, which specifies the client; the field supervisors and laborers assigned to a project; the safety precautions that must be taken at the beginning of a project; the work that needs to be completed; sometimes the priority of work; the necessary equipment; and the start dates and start times for the project. The field supervisors are subject to discipline if they perform any work that exceeds the description of work set forth in the job book, unless additional work is authorized by the client.

The field supervisor completes the supervisor's checklist to ensure proper work methods and safety precautions are taken and that proper safety equipment is being used. The type of safety equipment required by a given project is determined by the safety regulations that govern each particular project, though the field supervisor can designate how many items of equipment are needed. The field supervisor completes a daily log sheet, which indicates a project's daily start and finish times, the employees who worked on a project, and whether there were any injuries or safety violations. The field supervisor records the work hours of each employee on a project on a timesheet, which is submitted to the office once a week and is the sole basis for how laborers are paid. The field supervisor maintains custody of the license that authorizes the Employer to perform work on the project. Field supervisors also fill out waste manifest forms, which describe the method of waste disposal; injury report forms; and air monitoring data sheets, as well as collect samples for air monitoring.

Each job book typically contains a list of necessary equipment and supplies for each project. If the field supervisor in charge determines additional supplies are necessary, he can request a warehouseman deliver the supplies or the field supervisor may purchase minor items and seek reimbursement. The field supervisor must receive authorization from the director of field operations before purchasing or renting any major equipment that was not included in the

original equipment checklist. Field supervisors are responsible for signing a pre-delivery inspection form indicating the rental equipment is functioning properly and releasing the rental company from liability.

The field supervisor determines when a project has been completed. The field supervisor conducts a final inspection of the job site to ensure no materials are left and that the site is free of hazardous material. Most of the time, field supervisors have to sign a form verifying these facts. Field supervisors usually communicate to a client that a project has been completed and frequently the field supervisors conduct a final inspection with the customer. If a client requests additional work be performed on a project, the field supervisor completes an extra work authorization form, notifies the director of field operations, and requests any necessary additional manpower or supplies. The field supervisor cannot refuse any request for additional work, but cannot provide the client with an estimated cost of the additional work.

At the job sites, the field supervisor is the highest-ranking employee, though the director of field operations occasionally visits job sites. The field supervisors have Nextel phones and they are able to contact the director of field operations during the day, however in the evening and on weekends contact is not assured. If an unusual situation or problem arises on a job, the field supervisors decide whether or not to contact the director of field operations. Generally the director of field operations is notified of unusual safety issues, employee misconduct or accidents. The field supervisors spend the majority of their working time working side-by-side the laborers and spend the remainder of their time on paperwork, directing work, or talking with the client. Field supervisors are routinely assigned to unsupervised, one-man projects. On very rare occasions, laborers who possess the necessary licenses are also sent out on one-man projects.

Field supervisors are held responsible for any safety violations that occur on their projects. Field supervisors earn one "safety day," which is redeemable for a paid vacation day, for every 2 months they work without having a safety violation or any work-related injuries on

their jobsites. Field supervisors lose “safety days” when safety violations occur on their worksites. The Employer presented one safety violation from 1993 in which a field supervisor lost half of a “safety day,” because two laborers on his job site were not wearing safety glasses. One field supervisor testified that he would lose a safety day if a safety violation occurred on his job site, such as a worker falling off a ladder or a pedestrian wandering onto the job site.

C. Discipline/Suspension/Discharge

Field supervisors have the authority to remove laborers from their job sites. Field supervisors have sent employees off work sites for use of narcotics, tardiness, and endangering other employees. The director of field operations also testified that if a laborer shows up late to a job site, or engages in misconduct on a job, the field supervisor can dismiss the laborer from the job site and send the laborer home resulting in a loss of pay. In particular, the director of field operations testified to two occasions when field supervisors sent employees home from work sites because of misconduct. Though one field supervisor testified that “protocol” required the employee dismissed from a job site to report to the director of field operations, he conceded that this did not always happen immediately, especially during late-night projects and on weekends. The employee who has been removed from a job site ultimately reports to the director of field operations, who investigates and then determines whether the laborer is suspended, returned to the project, or reassigned to a different project if one is available.

Also, field supervisors have the authority to prepare disciplinary forms and recommend discipline be issued to laborers, though sometimes field supervisors merely verbally report employee misconduct to the director of field operations. Though the disciplinary forms have a space for field supervisors to recommend appropriate discipline--such as verbal warning, written warning, suspension, or discharge--the CEO or the director of field operations determine what, if any, discipline is issued after conducting an independent investigation. The field supervisors also may issue verbal warnings to laborers on job sites, but the field supervisors do not have access to employee personnel files, and the record does not establish that the Employer keeps

track of these warnings or that these warnings are part of any progressive discipline policy. Field supervisors may also orally recommend that a laborer be suspended or discharged, however, no decision is made prior to the director of field operations conducting an independent investigation.

D. Performance Evaluations/Reward/Promote/Layoff/Recall

The Employer has no established, regular system of performance evaluations. The most recent performance evaluations were performed in early 2004, when the director of field operations distributed rating sheets to the field supervisors to fill out on the laborers. Approximately 8 or 9 field supervisors anonymously filled out rating sheets on 25 laborers⁴. On the rating sheets, the field supervisors rated the laborers on a scale from 0 to 5, with 5 being the highest and 0 being the lowest. If the field supervisor had not worked with a laborer a “no rating” box was checked. The director of field operations testified that he totaled the scores for each laborer and inserted the scores on a summary sheet and that he uses the total scores on a daily basis to determine which employees to send out to the best jobs, and to determine in what order to layoff and to recall laborers. Though the director of field supervisors testified that he laid off approximately five laborers based on the ratings and the recommendations of the field supervisors who completed the rating sheets, the rating sheets, which are anonymous, do not contain a section for indicating whether a laborer should be laid off, discharged, or promoted. Also, the record does not reflect what else the director of field operations may have relied on. Field supervisors were not told that a certain numerical score would result in a layoff, wage increase, or promotion.

In 1999 and 2002, the field supervisors also completed performance evaluation forms on the laborers. The 1999 evaluation form contains a section for indicating whether, in the event of a layoff, the field supervisor would recommend keeping, getting rid of, or retraining the laborer. Also, the 1999 evaluation contains a section for indicating whether the field supervisor would

recommend that an employee be “let go.” However, the 2002 evaluation form does not contain a section to indicate whether a laborer should be kept in the event of a layoff, or whether a laborer should receive a wage increase, or be promoted, suspended, or discharged. The director of field operations testified that he considered the 1999 written performance evaluations of the field supervisors in determining whether to promote laborers, and that in 1999 he promoted one laborer in particular based on the recommendation of a field supervisor.

One field supervisor testified that the director of field operations had asked his opinion on whether to promote a laborer, but never indicated to what extent he would rely on the field supervisor’s opinion. The CEO testified in 2000, he approved wage increases for two laborers based on the input from field supervisors as recorded in memoranda from the then office manager. However, nothing in the memoranda indicated which, if any, field supervisors offered recommendations on the laborers. Field supervisors do not effectively participate in the hiring process.

III. ANALYSIS OF FIELD SUPERVISORS’ SUPERVISORY STATUS

The traditional test for determining supervisory status used for all employees is: (1) whether the employee has the authority to engage in any 1 of the 12 criteria listed in Section 2(11) of the Act; (2) whether the exercise of such authority requires the use of independent judgment; and (3) whether the employee holds the authority in the interest of the employer. *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 573-574 (1994).

The existence of one of the powers set forth in the statute determines whether or not an employee is a supervisor. The employee is not required to regularly and routinely exercise such power. Only employees with genuine management prerogatives are deemed supervisors rather than minor supervisory employees, such as leadmen or straw bosses. *Arlington Masonry Supply, Inc.*, 339 NLRB No. 99, slip op. at 2 (2003). The Board analyzes each case in order to distinguish between the giving of routine instructions and the exercise of independent judgment,

⁴ Employer has since laid off a number of laborers for economic reasons.

between forceful suggestion and effective recommendations and between the appearance of supervision and supervision in fact. *McCullough Environmental Services*, 306 NLRB 565 (1992). The burden of proving supervisory status lies with the party asserting that such status exists. *Kentucky River Community Care, Inc.*, 121 S. Ct. 1861, 1866 (2001). The Employer contends that the field supervisors are supervisors within the meaning of the Act because they have the authority to assign, transfer, responsibly direct, discipline, suspend, and by completing performance evaluations, they effectively recommend rewards, promotions, layoffs, and recall.

A. Assignment of Work/Transfers

The field supervisors clearly have the sole authority to assign work on the jobsite. However, assignment power is supervisory only if the purported supervisor exercises independent judgment or discretion in making assignments based on his own assessment of an employee. Independent judgment is demonstrated by evidence that an individual has discretion to assign work of differing degrees of difficulty or desirability on the basis of his own assessment of an employee's ability or attitude. Here, both field supervisors admitted that they assign work based on the employees' skills, ability, training, and experience. The work on these jobs clearly varies greatly in its nature and complexity as well as level of danger. That field supervisors rely on their own assessments is established by the example that the field supervisor would not assign dangerous work such as decontaminating hoods to an employee with whom he was not familiar. The other field supervisor also admitted that he made individualized assessments as to whether particular employees were suitable for asbestos projects or high work. Moreover, if necessary, the field supervisors do prioritize the work to be done on the project. Thus, the evidence establishes that the field supervisors are solely responsible for the assignment of duties on the job and that they exercise independent judgment in making these assignments. *Juniper Industries Inc.*, 311 NLRB 109, 110 (1993); *Dale Service Corp.*, 269 NLRB 924, 924 (1984); *Arlington Masonry Supply, Inc.*, *supra* at 2.

The evidence also demonstrates that field supervisors effectively recommend the initial assignment of specific laborers to their projects, the staffing levels during the course of the project, as well as the transfer of laborers between projects. The director of field operations approves 75-80 percent of field supervisors' requests that specific laborers be initially assigned to their projects. The field supervisors independently determine staffing levels during the course of the jobs; send employees from their work area to other worksites; and move employees between jobs. *Juniper Industries Inc.*, supra. The record evidence further demonstrates that field supervisors occasionally assign overtime work to laborers and even if they do receive approval, they choose which employees receive the overtime. *Arlington Masonry Supply, Inc.*, supra, at 3. Accordingly, I find that the field supervisors have the authority to transfer and assign within the meaning of Section 2(11) of the Act.

B. Responsible Direction

An employee who responsibly directs with independent judgment within the meaning of Section 2(11) of the Act, is one who has: (1) been delegated substantial authority to ensure a work unit achieves management's objectives and is thus "in charge"; (2) is held accountable for the work of employees in the unit; and (3) exercises significant discretion and judgment in directing his or her work unit. The record evidence establishes that field supervisors meet the criteria listed in each of the three factors.

With respect to the first factor, the evidence demonstrates that although field supervisors sometimes communicate with the director of field operations via Nextel phones, they are the highest ranking representatives of the Employer on the job site. The director of field operations spends only 10-15 percent of his time visiting the Employer's many worksites. *B & B Insulation, Inc.*, 272 NLRB 1215, 1215 fn. 1 (1984). The regulations that govern the Employer's projects require the presence of a licensed individual to act as a supervisor on the job site. The record establishes that the field supervisors fill that role.

Field supervisors are responsible for ensuring compliance with the various regulations that govern the Employer's projects. Field supervisors make sure a project stays on schedule and the laborers work under the lead field supervisor's direction. Field supervisors are responsible for making sure proper safety precautions are taken and that laborers wear the proper safety equipment. The field supervisor is responsible for conducting the final inspection of a worksite and has to work with the customers to make sure they are satisfied.

With respect to the second factor, the record demonstrates that field supervisors are held accountable for the work of the employees. The field supervisors are awarded safety days if employees have no accidents and commit no safety violations. Conversely, field supervisors may lose safety days if safety violations or accidents occur on the jobsite, no matter who is at fault. Moreover, field supervisors are held accountable for the satisfactory completion of the project, as evidenced by their responsibility for informing the customer of satisfactory completion; conducting the final inspection, and signing off on the final inspection form verifying the project as satisfactorily completed.

With respect to the third factor, the record reveals that the field supervisors do exercise independent judgment in directing the laborers. They are responsible for the safe and proper completion of work that is varied, frequently complex and high risk. The field supervisor is in charge of these jobs and the Employer has no other supervisor on these sites. Although the director of field operations is available by phone, these jobs frequently occur at night and on the weekends, when the director of field operations is not always accessible. Moreover, when unusual situations arise, the field supervisor determines whether he can handle the situation or whether he needs the assistance of the director of field operations. The Employer has no established guidelines as to when the director of field operations must be contacted. The field supervisors assign employees to particular jobs based on their assessment of the employees' skills, ability, and experience. The record contains no evidence of any Employer guidelines for specific task assignments on any particular job. When work falls behind schedule, the field

supervisor may choose to authorize small amounts of overtime. Additionally, field supervisors tell employees when to take their breaks or meals and exercise discretion in changing these based on the requirements of a project and absent any established guidelines maintained by the Employer. Field supervisors obtain additional supplies without prior approval by purchasing minor items for reimbursement or by contacting the warehousemen. At the end of a project, the field supervisor in charge conducts a final inspection to make sure that the work has been performed properly and that all hazardous material has been removed. Thus, the degree of judgment exercised by the field supervisors is sufficient to establish responsible direction within the meaning of the Act. *Dale Service Corp.*, supra, at 925; *B & B Insulation, Inc.*, supra, at 1219; cf. *Dynamic Science, Inc.*, 334 NLRB 391, 391 (2001).

C. Discipline/Suspension/Discharge

The authority of field supervisors to dismiss laborers from their job sites is also indicative of their supervisory status. The employer has no established guidelines limiting their discretion. The record establishes that field supervisors ordered employees to leave the worksite because of tardiness, drug use, misconduct, safety violations, or because the field supervisor felt the employee was a danger to himself or others. Though field supervisors usually instruct the dismissed laborers to report to the director of field operations, the record establishes that employees have been sent home without pay. Moreover, many jobs are in the evening and on weekends, and therefore removal from the jobsite would inevitably result in a loss of pay. Thus, this authority to remove employees from the jobsite, which may result in loss of pay and, at the least, results in change of worksite is indicative of supervisory status. *Sewell-Allen Big Star, Inc.*, 280 NLRB 1244, 1252 fn. 2 (1986); *Keystone Pretzel Bakery, Inc.*, 242 NLRB 492, 506 (1979); *Montgomery Ward & Co.*, 234 NLRB 13, 46 (1978). This authority is not limited to simply flagrant violations, rather due to the absence of established Employer guidelines, the authority appears more broad and discretionary. Cf. *Freeman Decorating Co.*, 330 NLRB 1143, 1144 (2000); *Quadrex Environmental Co.*, 308 NLRB 101, 101 (1992).

The record reflects that the field supervisors' remaining role in the Employer's disciplinary process is merely reportorial. Although field supervisors are authorized to verbally reprimand laborers at worksites, the record fails to establish that these reprimands carry any formal weight, such as being precursors to written warnings, or otherwise have an effect on employee job status. *Ken-Crest Services*, 335 NLRB 777, 778 (2001). The evidence is also insufficient to establish that the field supervisors effectively recommend written discipline, suspension, or discharge. Where corrective action is taken following an independent investigation by a higher authority, the authority to effectively recommend is lacking. *Children's Farm Home*, 324 NLRB 61, 67 (1997). Though field supervisors have the authority to prepare disciplinary forms regarding laborer misconduct, they do not have access to employees' personnel files. Additionally, higher management determines whether to issue an employee a written warning following an independent investigation. Further, while field supervisors have the authority to recommend that a laborer be suspended or discharged, higher management conducts an independent investigation before making the ultimate decision.

D. Performance Evaluations/Reward/Promote/Layoff/Recall

The field supervisors' role in completing the laborers' performance evaluations and recommending promotions does not confer supervisory status. In early 2004, the field supervisors assigned the laborers numerical scores based on rating sheets they completed. The director of field operations testified that he relied upon a summary of these numerical scores along with the recommendations of the field supervisors to layoff approximately five laborers, recall laborers, and assign laborers to desirable projects. The director of field operations further testified that in 1999 he relied on a field supervisor's written performance evaluation of a laborer to promote the laborer. The record does not establish, however, that the director of field operations relied exclusively on the evaluations or the recommendations to determine these employment actions. The Employer failed to establish a direct link between the

field supervisors' evaluations, rating sheets, and recommendations, and these employment actions. *Webco Industries*, 334 NLRB 608, 610 (2001).

E. Secondary Indicia

Finally, there is additional circumstantial evidence that lends support to the finding of field supervisors' supervisory status, although this secondary indicia cannot and has not been relied upon. Most notable is the substantial difference in hourly wage rate and benefits; the fact that the field supervisors are the highest ranking individual on the site and, unlike the laborers, are not generally subject to economic layoff. Moreover, the field supervisors sporadically attend management meetings to which laborers are not invited. Although the ratio of employees to supervisors is atypical, such a ratio is mitigated by the hazardous nature of the Employer's business work. *Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347, 365 (1980). Moreover, the Employer's workforce of laborers fluctuates depending on workload, and, the ratio would be exceedingly high, especially considering the hazardous nature of the work, if the field supervisors were not supervisors. Accordingly, I find that the field supervisors are supervisors because they have the authority to assign, responsibly direct, and discipline employees within the meaning of the Act and I shall exclude them from the unit found appropriate here.

IV. MANAGERIAL STATUS OF CERTAIN FIELD SUPERVISORS

The Employer further contends that the following six field supervisors are managerial employees and should be excluded from the unit on that basis.

A. Steve Estell

Field Supervisor Steve Estell has worked for the Employer for approximately 11 years and specializes in fireproofing work. In addition to his duties as field supervisor, Estell sometimes assists in performing the Employer's bid work by walking through a prospective job site and estimating the job's requirements. Estell finds bid opportunities in Missouri and Illinois in the public notices of local newspapers. After he sees a bid opportunity in the newspaper,

Estell contacts the vice president of estimating to ask whether the Employer would be interested in the potential project. The vice president of estimating then sometimes directs Estell to do a walk-through of the potential job site. Although the director of field operations testified that Estell sometimes performs bid work independently, Estell testified that he only performs walk-throughs at the direction of the vice president of estimating. Estell testified that the Employer invites all employees to assist in bringing potential projects to the Employer's attention.

Estell described a typical walk-through that he conducted at a middle school concerning a prospective floor tile job. Estell's walk-through consists of touring the site with the client and taking notes regarding the dimensions of the site and the needs of the client. After the walk through Estell then submits his notes to the vice president of estimating. Also, Estell sometimes offers advice concerning the manpower requirements of the job, and on one occasion he submitted a list of employees to work a job. Estell's bid notes sometimes address materials necessary for a job, if out of the ordinary. Also, field supervisors' bid notes do not reflect pricing. The final bid sheet is signed by an officer of the Employer rather than by the field supervisors.

Estell testified that he would likely be designated the field supervisor in charge of a job on which he performed bid work. Estell has assisted on job bids ranging from \$5,000 to \$60,000. Although the record reflects that Estell conducted approximately 58 hours of bid work in March 2004, Estell testified that he regularly spends only 10-15 percent of his working time doing bid work.

Estell is reimbursed for expenses he incurs while performing bid work and is paid for his drive time. Estell testified that he has spent a couple of hours researching the fireproofing business, and that on one occasion he assisted in pricing some fireproofing equipment that the Employer later purchased. However, Estell denied recommending the purchase of the fireproofing equipment and denied participating in meetings with management about increasing the Employer's fireproofing business. Although Estell's name appears on two invoices

referencing the purchase of materials, Estell testified that he never purchased or rented equipment or material without the approval of the vice president of estimating.

B. Saleh El-Fahmawi

Field Supervisor Saleh El-Fahmawi specializes in laboratory hood decontamination projects and spends about 95 percent of his time working on projects for Monsanto and Pfizer, which account for approximately 20 percent of the Employer's business. Though the director of field operations testified that El-Fahmawi is the main contact for the managers of these clients, with whom he independently schedules projects, El-Fahmawi testified that he has never performed work for these clients without prior authorization from the vice president of estimating. Sometimes the vice president of estimating advises El-Fahmawi of emergency projects, and El-Fahmawi may occasionally begin work on a project before receiving a job book. The director of field operations must approve El-Fahmawi's requests that specific laborers be assigned to jobs he supervises.

El-Fahmawi also performs bid work on jobs by providing the vice president of estimating with an estimate of the nature of the work to be performed, as well as an estimate of manpower and material requirements. The vice president of estimating then determines a price for the work and submits a bid sheet to the client. El-Fahmawi spends only about 5 percent of his working time assisting in bid work.

C. Stan Smith

Field Supervisor Stan Smith is primarily assigned to work on projects for the Boeing Corporation, which account for approximately 30 percent of the Employer's business. Smith sometimes communicates directly with the client regarding prospective projects and performs bid work by meeting with facility managers and providing estimates concerning a job's manpower and equipment requirements.

D. Vern Stemler

Field Supervisor Vern Stemler is primarily assigned to work on projects for Ameren UE. Stemler sometimes communicates directly with the client on projects, and assists in bid work by walking through potential job sites and providing estimates on manpower and material needs. The director of field operations estimated that he has overruled Stemler's decision to purchase supplies or equipment for an Ameren UE project only 5 percent of the time. Although a supplier issued Stemler a purchaser identification card, the evidence fails to establish that Stemler ever used the card to purchase or rent supplies or material on behalf of the Employer.

E. Charlie Peacock

Field Supervisor Charlie Peacock has worked for the Employer for at least 10 years and was temporarily in charge of the Employer's Wichita, Kansas office before it closed. While Peacock also performs bid estimating, the CEO testified that Peacock has performed bid work less than once a month for the past two years. Peacock was the field supervisor responsible for a large project in Florida one summer when he worked at the Employer's Florida office, which has since closed. Peacock, however, was not in charge of the Florida office. Peacock is the Employer's only field supervisor licensed to perform asbestos abatement work in Kentucky and also possesses a risk assessor license for lead paint.

F. Steve Wilkerson

Field Supervisor Steve Wilkerson specializes in the sampling of wastewater and storm water. Wilkerson visits 15 clients on a quarterly basis--approximately 1 month each quarter--and samples their wastewater. When performing wastewater-sampling jobs, Wilkerson reports directly to the vice president of engineering; otherwise Wilkerson reports to the director of field operations. Wilkerson communicates directly with wastewater clients, schedules the water sampling jobs, orders his own supplies, and arranges for the delivery of his water samples to a laboratory for analysis.

V. ANALYSIS OF FIELD SUPERVISORS' MANAGERIAL STATUS

The burden of proving managerial status lies with the party asserting such status exists. *Allstate Insurance Co.*, 332 NLRB 759, 759 fn. 2 (2000). The Board has long implicitly excluded managerial employees, who are not otherwise supervisory employees, from the Act's coverage. Managerial employees are those who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy. *NLRB v. Yeshiva University*, 444 U.S. 672, 683 (1980).

The Employer has not met its burden of proving the managerial status of the six field supervisors in question. The field supervisors' involvement in the Employer's bid process fails to demonstrate managerial status. The record evidence demonstrates that the six field supervisors only incidentally prepare estimates on job bids and that their input on bids is limited to fairly basic information, such as the dimensions of the site, the needs of the client, and manpower and equipment requirements. Technical expertise which may involve some discretion or judgment does not confer managerial status. *Bakersfield Californian*, 316 NLRB 1211, 1214-15 (1995).

The Employer concedes that these six field supervisors lack the authority to sign final bid sheets. Further, there is no evidence that the field supervisors "prepare projections of the cost of performing contracts on which the Employer intends to bid, including the estimated profit," or assist in negotiating contracts with customers. Cf. *Aeronca, Inc.*, 221 NLRB 326, 328 (1975). Also, there is no evidence that field supervisors have access to the Employer's confidential information, such as information pertaining to overhead rates and labor costs, when assessing manpower and material requirements for a project. Additionally, the evidence fails to demonstrate that the field supervisors' bid work is effectively binding on the Employer, or what, if anything, the Employer does with the estimates the field supervisors provide. Cf. *General Dynamic Corp.*, 213 NLRB 851, 862 (1974).

The record reveals that the field supervisors may occasionally make purchases of minor supplies on the Employer's behalf, and may assist the Employer in purchasing equipment by offering their advice. There is no evidence, however, that these activities involve a substantial part of the field supervisors' time or involve the exercise of independent discretion. Rather, the field supervisors' advice concerning equipment is merely that of knowledgeable employees, and the field supervisors' purchase of minor supplies is essential to maintaining the Employer's operational status quo. *Sampson Steel and Supply, Inc.*, 289 NLRB 481, 482 (1988). In sum, the Employer failed to establish that the six field supervisors exercise or recommend any

“discretionary actions that effectively control or implement employer policy.” *NLRB v. Yeshiva University*, supra, at 683⁵.

VI. UNIT PLACEMENT OF WAREHOUSEMEN

The Employer contends that warehousemen do not share a community of interest with laborers and, therefore, must be excluded from the proposed bargaining unit. For the reasons set forth below, I find that warehousemen do share a sufficient community of interest with laborers so that their inclusion in the unit, as sought by Petitioner, is appropriate.

A. Discussion of relevant factors

1. Wages/Hours/Working/Conditions/Supervision

There is a substantial difference in the wages and benefits of the warehousemen and laborers. Warehousemen range from \$13.50 and \$18.50 per hour whereas laborers are paid between \$10 and \$12 per hour. Warehousemen receive paid holidays, funeral leave, paid vacation, and 3 sick days each year, whereas laborers receive none of these benefits. Laborers, field supervisors, and warehousemen are all eligible for overtime pay. The Employer provides Nextel phones to warehousemen. While laborers are not typically provided

⁵ On Friday, June 4, 2004, day three of the hearing, the Employer proposed calling Vice President of Estimating Bill Talbert as a rebuttal witness to discredit the testimony of the field supervisors. Talbert, however, was not available to testify until Monday, June 7. The Employer made an offer of proof in support of its position. The Employer asserted that if called as a witness, Talbert would testify that he never makes substantial changes to Field Supervisor Steve Estell's bids; that Talbert views the job sites bid by Estell only 50 percent of the time; that Estell is the sole decision maker concerning the equipment, materials, and manpower used on fireproofing bids; that Talbert always follows Estell's recommendations concerning manpower and materials; that Field Supervisor Saleh El-Fahmawi acts independently in starting and calling off projects; and that El-Fahmawi, rather than Talbert, provides the director of field operations with a list of equipment, supplies, and material for jobs at Monsanto or Pfizer. The hearing officer rejected the Employer's offer of proof and refused to continue the hearing to permit Talbert to testify noting that the Employer could cross-examine the field supervisors and the laborer concerning these issues. I find that the hearing officer properly denied the Employer's request, as granting the Employer's request would have resulted in an unnecessary delay when the Employer had adequate opportunity over the course of 3 days to ensure the availability of any relevant witnesses. Moreover, the offer of proof is inadequate to establish the managerial status of either Estell or El-Fahmawi and the statement that El-Fahmawi can independently start and call off projects is merely conclusory and does not establish supervisory or managerial status. *Laurel Associates, Inc.*, 325 NLRB 603, 603 (1998).

Nextels, one laborer, who regularly works in confined spaces, is provided one. Laborers and field supervisors have access to the same Employer trucks as the warehousemen.

Warehousemen directly report to the director of field operations. Laborers also directly report to the director of field operations unless they are working on a job site, in which case they directly report to the field supervisor. Warehousemen are scheduled to work two staggered shifts between 6 a.m. and 7 p.m. Warehousemen keep track of their own work hours by filling out timesheets, which they submit to the front office. Field supervisors keep track of laborers' work hours. Laborers work irregular hours and sometimes work evenings and weekends. Laborers typically work shifts of 7 a.m. until 3:30 p.m., 8 a.m. until 4:30 p.m., 4:30 p.m. until 1 a.m. and 5 p.m. until 2 a.m. Field supervisors work similarly varied shifts. Warehousemen wear blue jeans and a shirt to work, even when they are at a job site. Laborers also wear blue jeans and a shirt to work, but often must change into protective clothing depending on the nature of the project they are assigned.

2. Training

Warehousemen have the same training and certification as field supervisors and are, therefore, qualified to substitute for laborers in field projects. Specifically, both warehousemen have asbestos supervisor licenses, and one warehouseman has a Hazwoper license. All of the Employer's field supervisors possess these licenses, as do five laborers. Both warehousemen previously performed field work for the Employer before becoming warehousemen; one was previously director of field operations.

3. Work Contact

The work contact between warehousemen and laborers is regular. On the first day of a project, laborers meet with warehousemen and field supervisors at the Employer's facility in the morning. During these meetings, warehousemen discuss with laborers and field supervisors what materials are needed for the job and field supervisors and laborers determine whether to deliver equipment to a job site or whether field supervisors and laborers will take the equipment

themselves. Otherwise, laborers report directly to the job site. Laborers regularly engage in dialogue with warehousemen regarding supplies and equipment. Also, laborers are regularly in contact with warehousemen at the Employer's facility on paydays. Field supervisors and warehousemen communicate on a daily basis concerning supplies and equipment needs.

4. Job Duties and Uniqueness of Function

The job duties of warehousemen do differ from those of laborers. Warehousemen spend about half of their working time at the Employer's warehouse repairing equipment, ordering and stocking supplies, and cleaning. The warehousemen spend the other half of their time transporting and delivering equipment and supplies to job sites, unloading them from the Employer's trucks, and loading supplies and waste materials for return to the warehouse. Field supervisors and laborers regularly assist warehousemen in loading and unloading equipment, although warehousemen do not stay at the job site after delivery is completed. While laborers do not typically work in the warehouse, sometimes they drive the Employer's trucks to the warehouse during a job to pick up and load equipment with which they return to the job site. The director of field operations testified that laborers go to the warehouse to pick up supplies or equipment about 5-10 percent of the time and spend about 0-5 percent of their overall work time at the office or warehouse. If work is slow, laborers and field supervisors will sometimes work side-by-side with warehousemen in the warehouse repairing and cleaning equipment.

Warehousemen regularly transport hazardous and other types of waste from the job site. Sometimes warehousemen work side-by-side with laborers and field supervisors while handling and loading waste on job sites. While warehousemen usually pick up waste materials from job sites that laborers and field supervisors have already packaged, warehousemen clean up any spills if the packages containing waste materials break during unloading.

On a very infrequent basis, approximately once per year, a warehouseman has been assigned to perform laborer work in the field. This may happen when a scheduled laborer does not show up or extra help is needed on the weekends.

B. Analysis

The Act requires only that the unit be an appropriate unit rather than the only appropriate or the most appropriate unit. *Vincent M. Ippolito, Inc.*, 313 NLRB 715, 717 (1994). The Board has found that employees who share some of the community of interest factors, but not all, can be placed together. *Space Mark, Inc.*, 325 NLRB 1140, 1141 (1998). As Petitioner seeks the inclusion of the warehousemen in the unit, I find that the warehousemen share a sufficient community of interest with laborers so that they need not be excluded from its appropriate unit.

There is a substantial difference in the wages and benefits of warehousemen and laborers. However, unit determinations are not necessarily affected by differences in rate of pay. *Triangle Building Products, Corp.*, 338 NLRB No. 29, slip. op. at 9 (2002). Both classifications have access to the Employer's trucks and are eligible to work overtime. Further, though laborers sometimes work irregular hours, there is considerable overlap in the work hours of warehousemen and laborers. While field supervisors assign laborers duties when they are on job sites, warehousemen and laborers are ultimately subject to the same oversight by the director of field operations. *United Rentals, Inc.*, 341 NLRB No. 72, slip. op. (2004). Additionally, warehousemen and laborers share the same training, which qualifies warehousemen to substitute for laborers on job sites.

Further, laborers have a substantial amount of work-related contact with warehousemen, there is a regular coordination of work, and a high degree of functional integration. Laborers meet with warehousemen at the Employer's facility on the first day of any project to discuss material and equipment needs and to coordinate the delivery of material and equipment to the worksite. Also, laborers and warehousemen are routinely at the Employer's facility at the same time on paydays. Warehousemen regularly deliver equipment and supplies to worksites and laborers often assist warehousemen in loading and unloading the trucks. Further, warehousemen regularly transport and unload waste that laborers package at job sites.

Additionally, there is a fair degree of interchange between laborers and warehousemen. Laborers perform approximately 10-15 percent of the loading, unloading, and delivery of supplies and materials from the Employer's warehouse to worksites. Occasionally, during slow work periods, laborers also work side-by-side warehousemen in the warehouse repairing and cleaning equipment. On rare occasions warehousemen substitute for laborers on field projects. *Space Mark, Inc.*, supra. Accordingly, I shall include the warehousemen in the unit found appropriate here.

VII. CONCLUSIONS AND FINDINGS

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.⁶
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time laborers and warehousemen employed by the Employer at its St. Louis, Missouri facility, EXCLUDING office clerical and professional employees, guards, and supervisors as defined in the Act.

⁶ The parties stipulated that the Employer, a Missouri corporation with its principal offices located in St. Louis, Missouri, is engaged in environmental consulting and remediation services. During the past 12 months, which period is representative of the Employer's operations, the Employer purchased and

VIII. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective-bargaining by Laborers' International Union of North America, the Eastern Missouri Laborers' District Council. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

received goods valued in excess of \$50,000, which goods were shipped directly to the Employer's St. Louis, Missouri facility from suppliers located outside the State of Missouri.

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to this election.

To be timely filed, the list must be received in the Regional Office, 1222 Spruce Street, Room 8.302, St. Louis, MO 63103, on or before **July 15, 2004**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (314) 539-7794 or by electronic mail at Region14@nrlb.gov. Since the list will be made available to all parties to the election, please furnish a total of two copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting

requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

IX. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by **July 22, 2004**. This request may not be filed by facsimile.

Dated: July 9, 2004
at: Saint Louis, Missouri

/s/ Ralph R. Tremain
Ralph R. Tremain, Regional Director
National Labor Relations Board, Region 14